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CITATIONS

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Cases—Continued

Federal Rules of Crim. P.—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 480

WARDEN, MARYLAND PENITENTIARY, PETITIONER

v.

BENNIE JOE HAYDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether a cap, jacket, and trousers worn by the respondent while executing an armed robbery were properly seized by police officers in the course of a search incidental to respondent's arrest.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTEREST OF THE UNITED STATES

This case presents a question of importance to federal, as well as State, law enforcement—*i.e.*, whether the Constitution prohibits the seizure by government

agents of property which is "of evidential value only" and which is found in the course of an otherwise lawful search. The court below held that the Fourth Amendment, as interpreted and applied by this Court, permits seizure in such circumstances only if the property seized is contraband, if its possession is illegal, if it is an instrumentality by which the offense was committed or if it is the "fruit" of the offense (R. 139). We do not believe that the language of the Amendment, its history or its policy justify a limitation of this kind.

We recognize, of course, that Rule 41(b) of the Federal Rules of Criminal Procedure presently authorizes the issuance of search warrants only for the search and seizure of fruits or instrumentalities of crime. But federal officers must often conduct searches incidental to arrest, searches of moving vehicles, or border searches. In so doing, or, indeed, in the course of a lawful search under a warrant, they may find property which is neither an instrumentality of an offense nor the fruit thereof, but which is nonetheless of substantial evidentiary value. Whether they may seize and retain such property for use in a criminal trial is affected by this Court's resolution of the question presented in this case.

Moreover, it is obviously important for purposes of the future application and the possible revision of Rule 41(b) to ascertain whether the present limitations of the Rule are constitutionally required. The draftsmen of Rule 41(b) recognized that they were merely restating statutory provisions enacted in the Espionage Act of 1917, 40 Stat. 226. See Reviser's

Note to Rule 41(b), F.R. Crim. P. That statute was enacted without any suggestion that it incorporated constitutional standards. The decision of the court below holds, in effect, that Rule 41(b) could not constitutionally be extended to authorize search warrants for property which is purely evidentiary.

STATEMENT

About 8:00 a.m. on March 17, 1962, an armed robber entered the business premises of the Diamond Cab Company in Baltimore, Maryland and took some $363.00 (R. 38, 92–93, 132). Two cab drivers in the vicinity followed the man from the scene. One of the drivers notified the company dispatcher by radio that the robber—a Negro about 5′8″ tall, wearing a light cap and a dark jacket, similar to a truck driver's uniform—had entered a house at 2111 Cocoa Lane (R. 38–39, 97–99, 102–103, 132). The dispatcher relayed the information to police who were proceeding to the scene of the robbery (R. 34, 39, 49, 132).

The police arrived at the house within minutes and were admitted to the premises by respondent's wife without objection. After ascertaining that no male was hiding on the first floor, one officer went to the basement and two officers proceeded upstairs (R. 39, 52–53, 56, 132). Respondent was found in an upstairs bedroom feigning sleep and was arrested (R. 39, 71–73, 132). One officer, hearing the continuous running of the toilet in an adjacent bathroom, found and seized a sawed-off shotgun and a pistol from the flush tank (R. 39, 59–61, 132). In a further search of the room, ammunition for the guns was found, as

well as a sweater and cap which were similar to the clothing described. These the clothing was found under respondent's mattress (R. 39, 61, 106–114, 132–133).

In the meantime, the officer searching the basement found a jacket and a pair of pants, complete with leather belt, in a washing machine. These articles were seized as fitting the description of the clothing worn by the robber (R. 40, 56–57, 133). The items of clothing seized, as well as the guns and ammunition, were admitted into evidence at trial without objection.

Respondent was convicted of robbery with a deadly weapon in the Criminal Court of Baltimore and sentenced to imprisonment for a period of fourteen years (R. 37–38, 41, 92, 126–127). Upon unsuccessful pursuit of post-conviction relief in the Maryland State courts, respondent filed the instant petition for a writ of habeas corpus in the United States District Court for the District of Maryland. The petition was denied on the finding that the arrest was lawful and the search and seizures were reasonable (R. 37–45). The court of appeals (one judge dissenting) agreed that the arrest and search were lawful but reversed because the clothing seized during the lawful search was held to be immune from seizure under the rule enunciated by this Court in *Gouled* v. *United States*, 255 U.S. 298 (R. 131–149).

INTRODUCTION AND SUMMARY OF ARGUMENT

The majority of the court below held that respondent's arrest had been lawful and that the search (in the course of which the telltale clothing was found) was permissible as incidental to that arrest. It con-

cluded, however, that the seizure of the clothing was constitutionally forbidden because of "the principle repeatedly declared by the Supreme Court [that] items having evidential value only are not subject to seizure and must be excluded at trial" (R. 137–138)—a principle which the court determined to be "of constitutional dimensions" (R. 138). In so doing the majority below recognized that "eminent judges and scholars have challenged the correctness and wisdom of [that] rule * * *" (R. 143). As *amicus* in this case we urge three alternative positions:*

First, and most importantly, we argue that the "mere evidence" limitation is unsound in all of its applications; that the rights secured by the Fourth Amendment bear no relation to the nature of the property being sought or seized; and that searches for specific evidentiary items, if conducted upon probable cause and with "the procedure of antecedent justification before a magistrate" (*Ohio ex rel. Eaton* v. *Price,* 364 U.S. 263, 272), are authorized by the Fourth Amendment.

Second, we argue that, irrespective of whether the Constitution permits a search for items which are of evidentiary value only, there is no constitutional language or policy prohibiting the seizure and retention of purely evidentiary matter if it is found in the course of a search incidental to arrest or during a search for the fruit or instrumentality of a crime. In brief, we urge that such protections for privacy as might be afforded by a total constitutional prohibition

*We do not discuss the propriety of collateral relief where the sole challenge is to the admissibility of evidence obtained by a search since that issue had not been raised by the petition.

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upon the institution of a search for "mere evidence" are beside the point when the question is whether evidentiary items may be seized if found in the course of a non-evidentiary search.[1]

Third, and most narrowly, we suggest that if the "mere evidence" rule is correct and if the only objects (other than contraband or other illegally possessed property) which may constitutionally be seized are "fruits" and "instrumentalities" of crime, these permissible categories should be construed liberally so that any tangible property which is believed to have facilitated the commission of the offense in any manner whatever would constitute an "instrumentality" thereof. Articles of clothing such as those seized here have been held by the federal courts to be "instrumentalities" of crime, and that rule should have been applied in this case.

We are not, of course, unaware of the fact that there is support for the "mere evidence" restriction in decisions of this Court—notably in *Gouled* v. *United States,* 255 U.S. 298, and in *United States* v. *Lefkowitz,* 285 U.S. 452. We recognize that by arguing for reversal of the decision below on either of our first two grounds we are seeking a departure from the relevant holding *Gouled.* We think it important to emphasize at the outset, however, that our challenge to *Gouled* and to the "mere evidence" doctrine which has developed from that decision does not draw in question this Court's decision in *Boyd* v. *United*

[1] We use the term "evidentiary" throughout this brief as referring to property which is of "evidential value only" or to a search for such property. By "non-evidentiary" we mean a search for property which falls into the categories held by the court below to be constitutionally subject to seizure.

States, 116 U.S. 616. We agree, in other words, that where a search or compulsory production of evidence involves the Fifth Amendment's protection against compelled self-incrimination, this Court's decision in *Boyd* controls. The heart of our argument is that *Boyd* has been erroneously extended under the *Gouled* decision and the "mere evidence" doctrine applied to instances involving no conceivable violation of a Fifth Amendment privilege. It is in those circumstances, we believe, that the courts have erred in concluding that the Fourth Amendment, standing alone, bars searches for and seizures of property which is "of evidential value only."

ARGUMENT

I

THE BILL OF RIGHTS DOES NOT PROHIBIT A SEARCH FOR AND SEIZURE OF AN OBJECT WHICH IS OF EVIDENTIAL VALUE ONLY

We begin with the language of the Fourth Amendment, which guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *," permits warrants for searches and seizures to issue only "upon probable cause, supported by oath or affirmation * * *," and requires that such warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." The Amendment obviously contemplates the seizure of "things" pursuant to a warrant; it imposes no limitation on the nature of these "things" other than its general prohibition against "unreasonable searches and seizures." From

the constitutional language itself, there is no reason whatever to suppose that a search warrant which meets the requirements of particularity and which is based upon sworn information amounting to probable cause may not issue if the "thing" being sought is "of evidential value only."

We submit, moreover, that there is nothing in the history of the Fourth Amendment to warrant characterizing an otherwise lawful search for a particularized evidentiary object (or its seizure) as "unreasonable." Nor is there any unique contemporary need for privacy with respect to evidentiary property which would justify treating it differently from the "instrumentalities" or "fruits" of crime. As we demonstrate below (pp. 10–12, *infra*), the "mere evidence" doctrine appears to be a vestige of an early stage in the development of our criminal jurisprudence. In today's world it serves no legitimate function and deserves no place in the law. For, as Chief Justice Traynor recently observed on behalf of the unanimous Supreme Court of California, the rule "creates a totally arbitrary impediment to law enforcement without protecting any important interest of the defendant." *People* v. *Thayer,* 63 Cal. 2d 635, 637, 408 P. 2d 108, 109, certiorari denied, 384 U.S. 908. The Supreme Court of New Jersey, also speaking unanimously through its Chief Justice, reached the same conclusion one year earlier, holding that "the Fourth Amendment contemplates that things may be seized for their inculpatory value alone and that a search to that end is valid, so long as it is not otherwise unreasonable and the Fourth Amendment's formal requirements, if appli-

cable, are met." *State* v. *Bisaccia,* 45 N.J. 504, 213 A. 2d 185, 193.

A. THERE IS NO HISTORICAL SUPPORT FOR THE PROPOSITION THAT THE FOURTH AMENDMENT WAS INTENDED TO FORBID SEARCHES FOR EVIDENTIARY MATTER OTHER THAN PRIVATE PAPERS

Students of the history and origin of the Fourth Amendment are in general agreement that this article was included in the Bill of Rights to prevent the abuses of the power to search which had become notorious in England and the Colonies before the American Revolution. See Lasson, *The History and Development of the Fourth Amendment to the United States Constitution,* pp. 22–105 (1934); Landynski, *Searches and Seizures and the Supreme Court,* pp. 19–40 (1966); *Frank* v. *Maryland,* 359 U.S. 360, 363–366. This Court has discussed the evils which the Fourth Amendment was designed to overcome—the use of the general warrant in England and the writs of assistance in the Colonies—the resistance to these abuses by men like John Wilkes and James Otis, and the landmark decision in *Entick* v. *Carrington,* 19 How. St. Tr. 1029, on too many occasions to warrant repetition here. See, *e.g., Stanford* v. *Texas,* 379 U.S. 476, 481–485; *Marcus* v. *Search Warrant,* 367 U.S. 717, 724–729; *Frank* v. *Maryland,* 359 U.S. 360; *Harris* v. *United States,* 331 U.S. 145, 157–161 (dissent); *Boyd* v. *United States,* 116 U.S. 616, 624–629. This history constituted, as this Court observed in *Marcus* v. *Search Warrant,* 376 U.S. 717, 729, "part of the intellectual matrix within which our own constitutional fabric was shaped." What it discloses is that the Founding Fathers were concerned with two

kinds of invasions of privacy—warrantless searches and searches under an indiscriminate general authority. It was to protect "the sanctity of a man's home and the privacies of life" (*Boyd* v. *United States,* 116 U.S. 616, 630) against unauthorized or overbroad invasions that the Amendment was adopted.

To insure that a man's home might not be invaded at the whim of government officials, "the Fourth Amendment interposed a magistrate between the citizen and the police * * * [and required the] magistrate to pass on the desires of the police before they violate the privacy of the home." *McDonald* v. *United States,* 335 U.S. 451, 455–456. And to insure that "no official of the State shall ransack [a man's] home and seize his books and papers under the unbridled authority of a general warrant" (*Stanford* v. *Texas,* 379 U.S. 476, 486), the draftsmen of the Bill of Rights authorized the issuance of only such search warrants as "particularly describ[e] the place to be searched, and the persons or things to be seized." There is no suggestion in the history of the Colonies or of seventeenth or eighteenth-century England that searches for "mere evidence" were a source of resentment or, indeed, that a power to search for evidentiary objects was exercised to any substantial degree.

In fact, our examination of the relevant history leads us to conclude that searches and seizures were conducted in England and the colonies principally for the purpose of gaining custody of forfeitable property and not in order to sequester evidence for trial.

There was apparently no provision in English law for the return of property which had been seized under a warrant. Consequently, if property was once seized, it remained forever in the custody of the state. Lord Camden's distinction in *Entick* v. *Carrington*, 19 How. State Tr. 1029, 1066, between a warrant for stolen goods and a general warrant supports this conclusion (emphasis added):

> [T]he difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, *and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.*

It is not surprising, therefore, that objects "of evidential value only" were not ordinarily subject to the power of search and seizure. Unlike fruits of crime—which were rightfully the property of the victim and could be reclaimed by public officers—or the tangible objects by which a felony was committed—which may have been forfeit to the crown as *deodand*[2]—"mere evidence" could not be permanently taken by the state. Lacking any specific authority to

[2] Black's Law Dictionary (4th ed.), p. 523, defines "deodand" as follows:

> In English law. Any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the crown to be applied to *pious* uses, and distributed in alms by the high almoner.

See also 1 Blackstone, *Commentaries* 300–302; Holmes, *The Common Law* 7, 24–26.

take temporary possession of such property in order to use it at a criminal trial, the state was unable to reach it at all.

The fact that seizures of "mere evidence" by warrant were not customary in the pre-Revolutionary period[3] does not mean that they were forbidden by the Fourth Amendment. That constitutional provision did not freeze the power to search or seize to the particular kinds of searches and seizures which had theretofore been conducted. Unlike the Seventh Amendment, the Fourth did not incorporate the then prevailing "rules of the common law." It prohibited only "unreasonable" searches and seizures, thereby affording room for application of the constitutional command in light of contemporary conditions. In *Carroll* v. *United States*, 267 U.S. 132, for example, this Court held that it was not unreasonable and therefore constitutionally permissible to search moving vehicles on probable cause without a warrant, even though such searches could hardly have been common at the time of the adoption of the Fourth Amendment.[4]

[3] It is important to distinguish, in this regard, between seizures under a general warrant and more specific searches and seizures. Obviously, as *Entick* v. *Carrington* and the other historic decisions in this area demonstrate, there were instances in which evidentiary matter was seized in the course of a general search for allegedly seditious libels. See, particularly, the description of the search of John Wilkes provided by Lord Camden in the *Entick* decision, 19 How. State Tr. at 1065–1066. That situation is distinguishable from a search for a specific evidentiary item.

[4] It is true that the Court did rely in *Carroll* on certain statutes enacted by the early Congresses to show that customs officials had then been authorized to search, without a warrant, ships, vehicles or beasts which, they had reason to suspect, were carrying merchandise which had been unlawfully im-

Temporary seizure of property for use as evidence at a criminal trial is part of our modern legal system. We recognize today that an individual and his property are subject to "certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery," and that exemptions from these duties must be based upon "substantial individual interest, which has been found, through centuries of experience, to outweigh the public interest in the search for the truth." *United States* v. *Bryan*, 339 U.S. 323, 331. See generally 8 Wigmore, *Evidence* §§ 2192–2194 (McNaughton rev. 1961). Rule 17(c) of the Federal Rules of Criminal Procedure authorizes the issuance of subpoenas for documentary evidence and other objects in a criminal proceeding, and the property brought into the custody of the court under such circumstances is obviously returnable when it has served its evidentiary function. Indeed, the power to compel the production of documents in civil cases for evidentiary purposes at a trial was explicitly recognized as early as the first Judiciary Act, 1 Stat. 82.[5] It follows, therefore, that it would not be con-

ported. 267 U.S. at 150–152. Even assuming that these statutes granted a power which went beyond the unique authority to conduct comprehensive border searches (see *Alexander* v. *United States*, 362 F. 2d 379 (C.A. 9)), they hardly established a customary practice of conducting warrantless searches of moving vehicles.

[5] *Entick* v. *Carrington* was decided on the premise that the production of documents could not be compelled even in civil cases. Lord Camden said (19 How. Stat Tr. at 1073):

> Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering

sistent with the historical purpose of the Fourth Amendment to construe it as preventing government officials from conducting an otherwise limited, reasonable and judicially authorized search designed to find and take into their custody, for the duration of a legal proceeding, an object which is purely evidentiary.

Nor is the historical argument supported by the language in *Entick* v. *Carrington,* 19 How. State Tr. 1029, 1073, which suggests that a search for, and seizure of, an evidentiary object is a form of self-incrimination. Lord Camden's observation that a "search for evidence is disallowed upon the same principle" as the rule "that the law obligeth no man to accuse himself" was in response to the "argument of utility" that "a *paper-search* [was desirable] in these cases to help forward the conviction." 19 How. State Tr. at 1073 (emphasis added). We of course agree, for reasons stated more fully below (pp. 27–31, *infra*), that a search for evidentiary private documents — a "paper-search"—would present serious questions under the

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evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action.

Compare Section 15 of the first Judiciary Act, which empowered courts "in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery * * *." 1 Stat. 82.

Fifth Amendment and would likely run afoul of *Boyd v. United States,* 116 U.S. 616. But the relevant passage in *Entick* v. *Carrington* cannot be taken, we submit, as holding that a taking of tangible evidence from the premises of an accused is, *ipso facto,* a violation of his privilege against self-incrimination. For what Lord Camden had in mind was the question whether process might be directed "against papers" (19 How. State Tr. at 1073–1074), not against clothing or other tangible non-testimonial objects.

Scholars who have examined the history and origins of the Fourth Amendment have concluded that it was designed for a purpose distinct from that of the Fifth Amendment's privilege against self-incrimination. See 4 Wigmore, *Evidence* § 2264, approved in Chaffee, *The Progress of the Law 1919–1922,* 35 Harv. L. Rev. 673, 697 (1922), and in Fraenkel, *Concerning Searches and Seizures,* 34 Harv. L. Rev. 361, 366–367 (1921). The policies underlying the Fifth Amendment privilege afford no historical basis, therefore, for reading into the Fourth Amendment any intention on the part of the Constitutional framers to prohibit the seizure of objects (other than private papers) for use as evidence in a criminal trial.[6]

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[6] We do not read the opinion of a majority of this Court in *Frank* v. *Maryland,* 359 U.S. 360, 363–366, as construing this history any differently. Mr. Justice Frankfurter, speaking for the majority in *Frank,* said that one of the two protections afforded by the Fourth Amendment, in light of its history, was "self-protection: the right to resist *unauthorized* entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property. Thus, evidence of criminal action may not,

B. THE RIGHTS OF PRIVACY SECURED BY THE FOURTH AMENDMENT ARE NOT INFRINGED BY OTHERWISE REASONABLE SEARCHES FOR EVIDENTIARY NON-TESTIMONIAL OBJECTS

Laying history to one side, we turn to the question whether, in relation to the interests protected by the Fourth Amendment, there is any rational contemporary justification for the rule that "mere evidence" may not be seized in an otherwise reasonable and lawful search. We believe that the limitation applied by the court below furthers no objective of the Fourth Amendment—that prohibiting the seizure of "mere evidence" unduly limits law enforcement officials without contributing, in any substantial manner, to the rights of privacy secured by the Fourth Amendment.

We start from the proposition that the heart of the Fourth Amendment is "[t]he security of one's privacy against arbitrary intrusion by the police" (*Wolf* v. *Colorado,* 338 U.S. 24, 27)—*i.e.,* "the right to shut the door on officials of the state unless their entry is under proper authority of law" (*Frank* v. *Maryland,* 359 U.S. 360, 365). The Fourth Amendment does, however, permit the state to infringe upon the protected privacy—to force open the door—if a judicial officer has authorized the search after being persuaded that it is based upon probable cause and is, therefore, not arbitrary.

The "right of the people" to close their homes and other private premises to unauthorized and arbitrary

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save in very limited and closely confined situations, be seized *without a judicially issued search warrant.*" 359 U.S. at 365 (emphasis added). This conclusion does not, we submit, reflect at all on searches made pursuant to *authorized* entries or *with* judicially issued search warrants.

government intruders is not advanced in the least, we submit, by the "mere evidence" limitation. For a search warrant directed to a particular evidentiary object infringes on privacy no more than a search warrant directed to a particular "instrumentality" or "fruit" of the offense. The suspect who conceals a gun or the proceeds of a robbery in his home is obliged to suffer a lawful search for the instrumentality or fruit; the suspect who hides his shoes because they would provide a means of placing him at the scene of a crime or hides his shirt because it is stained by his victim's blood should be subject to the same limited intrusion. We stress that almost invariably the state's real purpose is the same whether the object being sought is an "instrumentality" or is "mere evidence"; in both cases it is taken for possible use at trial. Forfeiture or *deodand* may be a theoretical possibility with regard to instrumentalities, but it would be blinking reality to distinguish their seizure from the seizure of "mere evidence" merely because of that improbable objective.

There is nothing inherent in a search for evidentiary matter which would conflict with the Fourth Amendment's requirement of specificity. A search warrant for evidence is doubtless subject to the same constitutional restrictions as a warrant for "instrumentalities" or "fruits"—it must "particularly describe[e] the place to be searched, and the * * * things to be seized." If the police wish to search a suspect's home, for example, because they have probable cause to believe that they would find a box of unique cigars which are similar to a cigar butt found

at the scene of the crime or because they have reason to believe that fibers found in the fingernails of a dead victim would match the material of a rug or drapes in a suspect's apartment, the warrant must specify what is to be seized. No greater opportunity for general searches is afforded by a rule permitting evidence to be sought than now exists if the police search under a warrant for fruits or instrumentalities.

Nor need there be any dilution of the requirement that searches be conducted only upon evidence amounting to probable cause as presented to "a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14. So long as the requirements of specificity and probable cause remain undisturbed, there is no danger that innocent persons will be subjected to arbitrary intrusions upon their privacy.

Finally, we note that nothing in the nature of property seized as evidence renders it more private, and thereby more subject to the protections of the Fourth Amendment, than property which is seized as the instrumentality of a crime. Apart from testimonial or communicative private papers—which we recognize as fully subject to the protection of the Fifth Amendment (pp. 27–31, *infra*)—the very same "papers and effects" may constitute "instrumentalities of crime" in some circumstances and "mere evidence" in others. Compare *United States* v. *Kirschenblatt*, 16 F. 2d 202 (C.A. 2); *United States* v. *Poller*, 43 F. 2d 911 (C.A. 2); *Takahashi* v. *United States*, 143 F. 2d 118

(C.A. 9); *Bushouse* v. *United States*, 67 F. 2d 843 (C.A. 6); *United States* v. *Thomson*, 113 F. 2d 643 (C.A. 7); *Williams* v. *United States*, 263 F. 2d 487 (C.A. C.A.), with *Marron* v. *United States*, 275 U.S. 192; *Foley* v. *United States*, 64 F. 2d 1 (C.A. 5); *Landau* v. *United States Attorney*, 82 F. 2d 285 (C.A. 2); *United States* v. *Boyette*, 299 F. 2d 92 (C.A. 4). Whether they fall into one category or the other depends not on any intrinsic characteristic of the property being seized but rather on the peculiar circumstances of the offense being investigated. Indeed, there may be circumstances in which the instrumentality of the offense is itself more clearly within a zone of privacy than "mere evidence" would be. There could be no doubt, for example, that in enforcing the statute held unconstitutional in *Griswold* v. *Connecticut*, 381 U.S. 479, police officers would be engaging in a far more offensive invasion of privacy if they searched for the instrumentalities of crime than if they searched for "mere evidence," such as proof that the prohibited product had been purchased or secondary evidence of its use. See 381 U.S. at 485.

We recognize, of course, that a lawful search may be invalidated by what is seized. See *Kremen* v. *United States*, 353 U.S. 346. We also assume that there may be "papers and effects" which are so inherently personal that for government officials to seize them would, *ipso facto*, amount to an impermissible invasion on the "privacies of life" secured by the Fourth Amendment. But these considerations hardly suggest that one should draw a line as between prop-

erty seized as the instrumentality of an offense and property seized as evidence. If a seizure is invalid because the items seized are too private to permit them to be reduced to government custody, it should make no difference whether they are instrumentalities of crime or "mere evidence." Similarly, if a seizure is too sweeping to pass constitutional muster—as was the seizure in *Kremen* v. *United States, supra*—it should make no difference whether the objects seized are instrumentalities or only evidence of crime. Cf. *Marcus* v. *Search Warrant,* 367 U.S. 717, 730–731; *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 212; *Stanford* v. *Texas,* 379 U.S. 476, 484–486. It is for these reasons that we believe that there is no basis in the protections afforded by the Fourth Amendment for the "mere evidence" rule as it has evolved since this Court's decision in *Gouled* v. *United States,* 255 U.S. 298.

To be sure, a ruling by this Court that searches for objects "of evidential value only" are constitutionally permissible might result in some increase in the number of searches. But we emphasize that these would have to be *lawful* searches—under a particularized warrant issued only where there is probable cause to believe that the specific evidence being sought is, in fact, on the premises.

In *Escobedo* v. *Illinois,* 378 U.S. 478, 488–489, this Court observed that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skill-

ful investigation." And in *Miranda* v. *Arizona*, 384 U.S. 436, 481, the Court noted that "standard investigating practices" were generally adequate to solve crimes of the nature then under consideration, and that confessions were not, therefore, essential.[7] It is fitting, we suggest, that the anachronistic "mere evidence" rule, which artificially limits searches and seizures, be overruled at the same time as law enforcement officials are urged to turn their efforts to "extrinsic evidence independently secured through skillful investigation." The very "extrinsic evidence" which may be needed to solve a crime and convict the offender is likely to be in his home, in the private premises of an accomplice or in some other area protected by the Fourth Amendment. If the police are powerless to reach it unless they can qualify it as an "instrumentality" of the offense, the alternative route encouraged by this Court may lead only to a dead end.[8]

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[7] The Court called attention (384 U.S. at 481, n. 51) to eyewitness testimony in three of those cases and to items which had been discovered during the search of an automobile and a home in two of the cases. Although the items referred to were "fruits" of crime, it is not inconceivable that "mere evidence," rather than fruit, might have been found.

[8] We note that even so vigorous a proponent of civil liberties as the late Professor Zechariah Chafee, Jr., viewed the consequence of the "mere evidence" rule as undesirable. Shortly after the decision in *Gouled* v. *United States*, 255 U.S. 298, Professor Chafee wrote:

> Unfortunately, the form in which the case was certified to the Supreme Court makes it impossible to limit the decision to the sensible proposition of statutory construction, that Congress had not as yet authorized the seizure of purely evidentiary material. The decision necessarily holds that

C. THE SEIZURE OF EVIDENTIARY OBJECTS OTHER THAN PRIVATE PAPERS DOES NOT VIOLATE THE FIFTH AMENDMENT

A rationale occasionally offered for the "mere evidence" rule is that the seizure of evidentiary matter from an accused amounts to an invasion of his constitutional privilege against self-incrimination.[9] We believe that this suggestion is unsound insofar as it relates to tangible objects other than testimonial or communicative private papers.

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such a seizure violates the Constitution; so that Congress cannot authorize it hereafter, even with a search warrant. Consequently, a criminal, who is clever enough to gather into his possession all the damaging documents which are not actually instruments of crime, will always be able to defy the Government to make the slightest use of such papers against him. What are the police to do, even though they know exactly where the evidence is? They cannot obtain a subpoena *duces tecum* ordering him to bring the papers into court himself, for that would violate his privilege against self-incrimination. They cannot break into his house with a search warrant and take the papers from him by force, because the warrant would be invalid and the evidence wholly inadmissible, at least if the accused made a seasonable demand for its return. This "astonishing situation" stirs the *Yale Law Journal* to apply Wigmore's phrase, "justice tampered with mercy."

Chafee, *The Progress of the Law 1919–1922*, 35 Harv. L. Rev. 673, 699 (1922).

[9] See, *e.g.*, *State* v. *Bisaccia*, 45 N.J. 504, 213 A. 2d 185; Comment, 20 U. Chi. L. Rev. 319, 324 (1953). In *Gouled* v. *United States*, 255 U.S. 298, 311, the Court held that the *admission in evidence of unlawfully seized* objects violated the privilege against self-incrimination. Compare *Mapp* v. *Ohio*, 367 U.S. 643, 661 (concurring opinion). That is, of course, a substantially different proposition from the suggestion that the seizure is, in the first instance, unlawful because it violates the privilege.

The scope of the Fifth Amendment privilege with respect to an individual's testimony and property was outlined by this Court in *United States* v. *White*, 322 U.S. 694, 698–699:

> The Constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. * * * [The privilege] protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness.

A search and seizure involves no disclosure, production or authentication by the accused himself. As Professor Chaffee observed, "the privilege is violated when a man is compelled to do something active, whereas he usually remains passive during an unreasonable search and seizure." Chaffee, *The Progress of the Law, 1919–1922*, 35 Harv. L. Rev. 673, 697–698 (1922). With respect to a search and

seizure, even more than with respect to other conduct which has been held not within the privilege against self-incrimination, the accused's "participation * * * [is] irrelevant." *Schmerber* v. *California,* 384 U.S. 757, 765.

The *Schmerber* decision establishes, we submit, that the seizure of "mere evidence" which is not testimonial or communicative does not violate the Fifth Amendment privilege. This Court held in *Schmerber* that the seizure of a blood sample from the body, taken under clinical conditions and upon probable cause to believe it contained evidence of intoxication, was a reasonable search and seizure under the Fourth Amendment, and that such withdrawal of blood and use of the analysis as evidence at trial did not involve compulsory self-incrimination. 384 U.S. at 761–762. In so holding, the Court stated that "the privilege [against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature * * *." In response to a dissent suggesting that the report of the blood test was "testimonial" or "communicative" because the test was performed in order to obtain the testimony of others, the majority responded (384 U.S. at 761, n. 5):

> Of course, all evidence received in court is "testimonial" or "communicative" if these words are thus used. But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or head-shake is as much a "testimonial"

or "communicative" act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts noncommunicative in nature as to the person asserting the privilege, even though, as here, such acts are compelled to obtain the testimony of others.

The blood seized from the petitioner in *Schmerber* was plainly "mere evidence." Indeed, the Court characterized the State's conduct as compelling petitioner "to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense." 384 U.S. at 761. Notwithstanding this characterization, the Court held that the privilege against self-incrimination had not been violated. It said that "the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd* v. *United States,* 116 U.S. 616." 384 U.S. at 763–764. We draw the same distinction here. So long as no testimonial or communicative evidence is involved, the seizure of "mere evidence" infringes upon no Fifth Amendment right.

Boyd v. *United States,* 116 U.S. 616, marks the dividing line between what is permissible and what is not. In *Boyd* a subpoena was served upon the owner of certain goods against which a forfeiture proceeding had been instituted. The subpoena, which was issued under the authority of an Act of Congress, sought to compel the production of an invoice under which goods had been brought into the country. The

Court held that "compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property," was indistinguishable from a search and seizure and was, therefore, "within the scope of the Fourth Amendment" (116 U.S. at 622); that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of [*Entick* v. *Carrington*]" (116 U.S. at 630); and that "the seizure of a man's private books and papers to be used in evidence against him is [not] substantially different from compelling him to be a witness against himself" (116 U.S. at 633).

The decision in *Boyd* turned, we believe, on two factors not present in this case or in most cases involving seizures of "mere evidence."

First, as the concurring Justices observed (116 U.S. at 638–641), *Boyd* involved a subpoena issued to the accused himself; it therefore presented a most straightforward self-incrimination claim. It was well settled in English law long before the adoption of the United States Constitution that a defendant in a criminal trial could not be compelled to come forward and produce any tangible or testimonial evidence whatever. See 10 Halsbury's Laws of England (3d ed.), §837, p. 456, and cases cited at note (s). Even if the object sought by subpoena in *Boyd* had been a weapon or contraband or fruits of crime, the Fifth Amendment privilege against self-incrimination would have entitled the defendant to refuse to comply because in responding to the subpoena he

would have to produce and authenticate the incriminating evidence. See *Curcio* v. *United States,* 354 U.S. 118, 125; *United States* v. *White,* 322 U.S. 694, 698–699. Indeed, it seems quite clear from more recent decisions that the vice in *Boyd* was precisely that the invoice was sought by subpoena rather than by warrant; the Court has held since *Boyd* that documents similar in kind to the paper sought in that case are instrumentalities of crime and may be seized as such. *Marron* v. *United States,* 275 U.S. 192; *Zap* v. *United States,* 328 U.S. 624.

Second, the Court in *Boyd* emphasized the fact that the subpoena in that case attempted to reach private papers—much the same defect which Lord Camden had found in a "paper-search" in *Entick* v. *Carrington.* See pp. 14–15, *supra.* A suspect's private papers may, of course, be "testimonial" or "communicative" and thereby come within the reach of the Fifth Amendment as construed in *Schmerber* v. *California,* 384 U.S. 757. Copies of private correspondence may, for example, contain admissions of crime or of conduct which may constitute a "link in the chain of evidence needed to prosecute * * *for a federal crime." *Hoffman* v. *United States,* 341 U.S. 479, 486. In this respect there can be no dispute over the truth of this Court's observation in *Boyd* that "we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." 116 U.S. at 633. It would doubtless violate "the spirit and history" (384 U.S. at 764), if not the letter, of

the Fifth Amendment if government agents who learned of the existence of a private document in which a suspect had confessed to the commission of a crime obtained that paper, for use as evidence against the suspect, by a search of his home. That, we believe, might well constitute "communicative" or "testimonial" evidence taken by compulsion from the accused himself, and it would be subject to a Fifth Amendment challenge.

For the above reasons, we do not contend that "private papers" such as a personal diary or copies of personal correspondence may be seized consistently with the Fourth and Fifth Amendments. Even where such documents are not strictly "testimonial" or "communicative," they are likely to be so intrinsically personal that to permit government agents to search through them would infringe upon the privacy which the Fourth Amendment was designed to secure.[10] See pp. 16–20, *supra*. Moreover, we recognize that once a search through private papers is authorized—even if its objective be an impersonal document wholly devoid of "testimonial" or "communicative" content—government officers thereby gain access to papers which they have no right to see

[10] Lord Camden said in *Entick* v. *Carrington*, 19 How. State Tr. at 1066:

> Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. * * *

because they are private or because they contain self-incriminatory admissions.[11] For these reasons we limit our argument in this case to searches for tangible objects other than private papers. That limitation is not intended to apply, however, to ordinary commercial and official documents such as business records, passports, decoding tables, utility bills and the kinds of papers which would qualify as instrumentalities of a commercial criminal endeavor such as was involved in *Marron* v. *United States,* 275 U.S. 192, 198–199.

D. INSOFAR AS IT IS RELEVANT, *GOULED* V. *UNITED STATES* SHOULD NO LONGER BE FOLLOWED

The third question certified to this Court in *Gouled* v. *United States,* 255 U.S. 298, concerned the issue involved in this case—*i.e.,* whether papers "possessing evidential value" against suspects were seizable under a search warrant. The question related to three specific documents—an unexecuted written agreement, a written and signed contract and an attorney's bill for legal services. The Court observed that the facts recited in the certificate did not show whether the papers were seizable as instrumentalities of crime

[11] As Chief Justice Weintraub of the Supreme Court of New Jersey put it in *State* v. *Bisaccia,* 45 N.J. 504, 213 A. 2d 185, 191:

> [E]ven a search for a specific, identified paper may involve the same rude intrusion if the quest for it leads to an examination of all of a man's private papers. Hence it is understandable that some adjustment may be needed, and presumably it is to that end that a search may not be made among a man's papers for a document which has exidential value alone. * * *

(255 U.S. at 310–311), and it held that a search warrant might not constitutionally be used "as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding." 255 U.S. at 309. The Court specifically disclaimed any reliance on the fact that papers, as distinguished from other tangible objects, had been seized.[12] It relied entirely on the proposition—assertedly based on the earlier decision in *Boyd*—that a search warrant might be used "only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken." 255 U.S. at 309.

It is true that the opinion of the Court in *Boyd* did distinguish between searches for stolen or forfeited goods and searches of private papers on the grounds, *inter alia,* that "[i]n the one case, the government is entitled to the possession of the property; in the other it is not." 116 U.S. at 623. But that was plainly not the critical point in *Boyd;* if it were, there would have been no reason whatever for the Court to consider the

[12] "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant." 255 U.S. at 309.

relevance of the Fifth Amendment. And yet *Boyd* is essentially a Fifth Amendment case. The crux of the decision is, as we have shown (pp. 26–28, *supra*), that in two respects—as a demand on the accused to come forward and as a means of reaching private papers—the government's conduct in *Boyd* violated the Fifth Amendment's privilege against self-incrimination.

Gouled was wrong, we submit, insofar as it removed the Fifth Amendment underpinnings of *Boyd* and held that even where there is no possibility of self-incrimination a search for evidence violates the Fourth Amendment. The proper understanding of the Fourth Amendment as applied in *Boyd,* we submit, is that under a warrant or in any other circumstances where a search is lawful under the Fourth Amendment, any property having evidential value may be taken for purposes of trial unless, because of the inherent nature of what is taken, its seizure violates the Fifth Amendment's privilege against self-incrimination, some other particular interest of privacy, or a discrete constitutionally protected right.[13]

There have been several opinions of this Court since *Gouled* in which the "mere evidence" rule was repeated,[14] but we know of no other case in which it was

[13] The First Amendment is, of course, involved when printed matter intended for distribution is seized. Stricter standards are appropriate in such circumstances than when no First Amendment interest is at stake. See *Stanford* v. *Texas*, 379 U.S. 476, 484–485; *A Quantity of Books* v. *Kansas*, 378 U.S. 205, 212; *Marcus* v. *Search Warrant*, 367 U.S. 717, 730–731.

[14] *Harris* v. *United States*, 331 U.S. 145, 154; *United States* v. *Rabinowitz*, 339 U.S. 56, 64 n. 6; *Frank* v. *Maryland*, 359 U.S. 360, 365; *Abel* v. *United States*, 362 U.S. 217, 234–235.

actually the ground of decision. In *United States* v. *Lefkowitz,* 285 U.S. 452, evidence was held inadmissible because it had been obtained by a general and exploratory search. In addition, the Court noted that the items seized were "unoffending" and were taken only for use as evidence, in violation of the rule of *Gouled.* 285 U.S. at 465–466. That observation, however, was not a ground of decision.

On the other hand, within the past year this Court has, on three occasions, approved *sub silentio* seizures of "mere evidence." In *Schmerber* v. *California,* 384 U.S. 757, the blood taken from the petitioner was plainly not an instrumentality or fruit of the offense. Nonetheless the Court sustained its seizure against a Fourth Amendment challenge. In *Osborn* v. *United States,* 385 U.S. 323, a Fourth Amendment challenge was made to the use of a device with which a government informant secretly recorded a conversation he had with the petitioner in the petitioner's office. The Court rejected the claim on the theory that the judicial permission obtained before the recording was made was the equivalent of a search warrant for Fourth Amendment purposes. The Court did not consider whether what was seized—*i.e.,* petitioner's words—were "instrumentalities" of the crime or "mere evidence."[15] And finally, in *Cooper* v. *California,* No. 103, this Term, decided February 20, 1967, the object found in

[15] The government argued that since the conversation was part of petitioner's attempt to obstruct justice, the words were, in fact, instrumentalities of the offense. See Brief for the United States, No. 29, this Term, p. 34. The Court did not, however, pass on this contention.

the petitioner's seized automobile introduced in evidence was "a small piece of a brown paper sack" which matched the brown paper in which heroin sold to an informant had been wrapped. See Record, No. 103, this Term, pp. 86–87, 130–131, 157, 254, 270. The "small piece" of brown paper was obviously of "evidential value only"; it had not been used as wrapping and was relevant only because it connected petitioner to the package of narcotics. Yet this Court sustained the conviction, apparently holding that the seizure of the paper was authorized because the search of the automobile was a permissible one.

These recent cases, as well as recent and unanimous decisions of the highest courts of New Jersey and California,[16] strongly suggest that the *Gouled* decision, insofar as it related to the third and fourth certified questions in that case, is no longer a viable precedent. This Court recognized in *Ker* v. *California,* 374 U.S. 23, 33, "that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application * * *." We believe that the standard established in the *Gouled* decision is erroneous and that it should no longer be followed.

II

IRRESPECTIVE OF WHETHER SEARCH WARRANTS MAY CONSTITUTIONALLY ISSUE FOR PROPERTY WHICH IS OF EVIDENTIAL VALUE ONLY, SUCH PROPERTY MAY BE SEIZED IN THE COURSE OF A SEARCH INCIDENTAL TO ARREST

Assuming, *arguendo,* that the protection afforded to the privacy of "persons, houses, papers, and effects"

[16] *State* v. *Bisaccia*, 45 N.J. 504, 213 A. 2d 185 (1965); *People* v. *Thayer*, 63 Cal. 2d 635, 408 P. 2d 108, certiorari denied, 384 U.S. 908 (1966).

by the Fourth Amendment justifies a constitutional rule that forbids their invasion by government agents seeking "mere evidence," that rationale is obviously inapplicable when the agents are lawfully on the premises for some other purpose and are authorized to search. When, as was true in this case, the search which produces the evidentiary property is a lawful search incidental to arrest, no greater invasion of privacy results if evidential objects are taken along with fruits and instrumentalities.

Judge Learned Hand commented upon this aspect of the "mere evidence" rule in *United States* v. *Poller*, 43 F. 2d 911, 914 (C.A. 2):

> In conclusion, it is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself, and in any case it is something to be assured that only that can be taken which has been directly used in perpetrating a crime.

We have previously observed that there is nothing inherent in evidentiary objects which distinguishes them from similar objects qualifying as instrumentalities of crime (pp. 18–19, *supra*). Consequently, we think it unlikely that "the quest itself"—the search

conducted by arresting officers—will be any less thorough if the *Gouled* rule is held applicable to searches incidental to arrest than if "mere evidence" is held to be seizable if found during such a lawful search.

It is already well established that objects subject to seizure may be taken if found in the course of a lawful search—even if they were not, in the first instance, the objects for which the search was conducted or in any manner related to the offense upon which the accused was arrested. *Abel* v. *United States,* 362 U.S. 217, 238; *Harris* v. *United States,* 331 U.S. 145, 153–154. In the instant case, no less clearly than in *Abel* and *Harris,* the officers were properly on the premises and engaged in lawful search when the objects in question were discovered. Since no interest in privacy was violated when the clothing was taken, it serves no Fourth Amendment policy to suppress its use as evidence.[17]

Indeed, statements by this Court in several opinions support the view that "mere evidence" may be seized in a search incidental to arrest. In *Weeks* v. *United States,* 232 U.S. 383, the Court observed that arresting agents had a right "always recognized under English

[17] This Court said in *Abel* (362 U.S. at 238) that "[a]n arresting officer is free to take hold of articles which he sees the accused deliberately trying to hide. This power derives from the dangers that a weapon will be concealed, *or that relevant evidence will be destroyed.*" (Emphasis added.) The danger that "relevant evidence will be destroyed" exists whenever objects of evidential value are discovered in the course of a lawful search. If they are not taken, the suspect or others who have access to the searched premises will be able to remove or destroy the evidence.

and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." 232 U.S. at 392. That observation was quoted and relied on by this Court as recently as *Schmerber* v. *California,* 384 U.S. 757, 769. And in *United States* v. *Rabinowitz,* 339 U.S. 56, this Court interpreted the doctrine to cover not only the *person* of the accused but also "the place where the arrest is made," noting that the power "seems to have stemmed not only from the acknowledged authority to search the person, but also from the long-standing practice of searching for *other proofs of guilt* within the control of the accused found upon arrest." 339 U.S. 56, 61 (emphasis added). We submit that these conclusions accord with the policies of the Fourth Amendment because the seizure of "mere evidence" does not, in such circumstances, invade privacy to any greater extent than does the search itself.

III

CLOTHING WORN BY AN ACCUSED AT THE TIME WHEN THE OFFENSE WAS COMMITTED IS AN "INSTRUMENTALITY" OF THE CRIME

In any event, even if this Court were to sustain the "mere evidence" rule as applied to searches incidental to arrest, clothing worn by the defendant during the commission of the crime satisfies the standard of "instrumentalities used as a means of committing a criminal offense," as those terms have been liberally construed by this Court and the lower federal courts. What this Court said of business ledgers in *Marron* v. *United States,* 275 U.S. 192, 199, is applicable here:

> And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. * * *

Clothing may not strictly be an instrumentality of the crime in the same sense as a weapon. But in offenses of stealth and violence, what the culprit wears is designed to aid in insuring the success of the criminal venture by reducing the chances of his identification and observation by witnesses. It is "part of the outfit or equipment actually used to commit the offense" within the meaning of the *Marron* decision.

No interest in privacy is served by forbidding the seizure of a tangible object so intimately related to the commission of the offense. If a suspected offender is arrested while still wearing the clothing in which he was dressed when the offense was committed, he would plainly have no constitutional right to insist on changing his garments and destroying those he is wearing before being taken into custody and viewed by witnesses. The same result should obtain, we believe, if he has succeeded in removing his clothing before arrest. The federal courts of appeal have repeatedly held that clothing worn by an accused while committing a crime, being so closely tied to the commission of the criminal act, is subject to seizure incidental to arrest. See, *e.g.*, *Margeson* v. *United States,* 361 F. 2d 327 (C.A. 1), certiorari denied, 385 U.S. 830; *United States* v. *Caruso,* 358 F. 2d 184 (C.A. 2), certiorari denied, 385 U.S. 862; *Whalem* v. *United States,* 346 F. 2d 812, 813–814 (C.A.D.C.),

certiorari denied, 382 U.S. 862; *Caldwell* v. *United States,* 338 F. 2d 385 (C.A. 8), certiorari denied, 380 U.S. 984; *Robinson* v. *United States,* 283 F. 2d 508 (C.A.D.C.), certiorari denied, 364 U.S. 919; *Charles* v. *United States,* 278 F. 2d 386, 388–389 (C.A. 9), certiorari denied, 364 U.S. 831; *United States* v. *Guido,* 251 F. 2d 1, 304 (C.A. 7), certiorari denied, 356 U.S. 950; *Morton* v. *United States,* 147 F. 2d 28 (C.A.D.C.), certiorari denied, 324 U.S. 875.[18] That rule should govern this case.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court of appeals should be reversed.

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[18] *Morrison* v. *United States,* 262 F. 2d 449 (C.A.D.C.), is not to the contrary. In that case, clothing *not* worn during the commission of the crime was seized during an illegal search of the defendant's home.